N.IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 3846 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE K.A.PUJ

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MF SAIYED - Petitioner(s)

Versus

STATE OF GUJARAT & 7 - Respondent(s)

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Appearance :

MR MUKUL SINHA for Petitioner(s) : 1,
MR LB DABHI, AGP for Respondent(s) : 1 - 2.
None for Respondent(s) : 3 - 5.
MR DC DAVE for Respondent(s) : 6 - 8.

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CORAM : HONOURABLE MR.JUSTICE K.A.PUJ

Date : 13/01/2006

ORAL JUDGMENT

1. The petitioner has filed this petition under

Article 226 of the Constitution of India praying for the direction to the respondent to assign the seniority to the petitioner in the cadre of clerk-cum-typist (English) from his initial date of appointment i.e with effect from 1.3.1985. The petitioner has also sought for the direction to the respondent to determine the seniority in the cadre of clerks and clerk-cum-typists, on the basis of the continuous officiation, as laid down by the Hon'ble Supreme Court and sought further direction to the respondent to give promotion to the cadre of assistant, from the cadre of clerk and clerk-cum-typists, considering the seniority determined on the basis of the continuous officiation.

2. The petition was originally dismissed by this Court vide order dated 5.10.1999. While dismissing the said petition, the Court has

held that an incumbent who is appointed as Clerk-cum-typist in regular manner, the regular selection process is completed only on passing the departmental examinations within three prescribed chances. No fourth chance is permissible to be availed by an incumbent as a matter of right to be placed at par with those who cleared departmental examination within the prescribed chances. If a condition is attached to give a grace chance or an additional chance to an incumbent to save elimination from service altogether, in such event his appointment is subject to such condition and shall be treated as fresh appointment and he cannot claim his seniority on the basis of initial appointment. The Court has further held that the rule cannot be said to be unreasonable or contrary to any principle of equity, fairplay and justice. The question of seniority depends on the operation of the Rules

itself and cannot be decided on general principles enunciated for different situations where specific Rules govern the field.

3. Being aggrieved by the said order the petitioner preferred LPA No.1606 of 1999. The said LPA was decided on 27.12.1999. Before the Division Bench the contention was raised on behalf of the appellant / petitioner that the petitioner wanted to challenge the validity of certain rules. The Court acceded to the request of the appellant and, thereafter, draft amendment was submitted. The petition was disposed of without any order being made to amend the petition. Considering this aspect of the matter, the Division Bench has allowed LPA and quashed and set aside the orders passed by the learned Single Judge. The court, however, made it very clear that the Court has not expressed any opinion on the merits of the

matter and as and when the matter would be placed for hearing, it was open for both the parties to raise all contentions available to them in law.

4. The present petition is, therefore, heard denovo on merit.

5. Dr.Mukul Sinha, the learned advocate appearing for the petitioner has given the brief resume of facts of the case and submitted that the petitioner was initially appointed as Clerk-cum-typist in the office of the Government Pleader vide order dated 21.2.1985. Pursuant to the said appointment the petitioner had joined his duties on 1.3.1985. The petitioner was required to pass departmental examination within three chances. The petitioner has not passed the said examination within three chances. The petitioner had

appeared in the said examination in September, 1990, as the fourth chance and the result of the said examination was published on 29.4.1991, wherein the petitioner was declared pass and accordingly the petitioner was given the seniority from 29.4.1991. It is the case of the petitioner that though the petitioner has passed the required examination, the petitioner was not given the seniority from his initial date of appointment, as was done in other cases, and that has given rise to the present petition.

6. Dr. Sinh has further submitted that the respondent No.2 submitted seniority list of the employees on 18.3.1999 wherein seniority position as on 1.1.1999 was shown. The petitioner has raised grievance against the placement of the petitioner, because the petitioner was not assigned the seniority from

his initial date of appointment. It is also the case of the petitioner that the petitioner has made representation before the respondent authority and his representation was turned down vide letter dated 9.4.1999. It is also the case of the petitioner that the respondent authority has decided to give promotion from the cadre of junior clerk to the cadre of assistant, to those persons who were juniors to the petitioner, on the basis of the continuous officiation, which was the legal basis for computation of seniority, as per the ratio laid down by the Hon'ble Supreme Court.

7. During the pendency of this petition an amendment was sought for in the petition and the same was granted on 3.4.2000. By virtue of the amendment, the petitioner has challenged the proviso to the Rule-3 of the Gujarat Non-Secretariat Clerks and Clerk – Typist (training

and Examination) Amending Rules, 1994 on the ground that the same is wholly unconstitutional and in clear violation of the Article 14 of the Constitution of India in as much as the said proviso creates sub-classes amongst the persons belonging to a single class of employees by treating those who have passed the post training examination in three chances in comparison to those who have not passed the same in the said three chances. It is further submitted that such sub-classification is not permissible and these two groups cannot be treated differently as has been held by the Supreme Court in the case of Sarjo Rani vs. State of Punjab, reported in (1999) 6 SCC 637. It is further submitted that such a sub classification is not based on any intelligible differentia and has no nexus with the object of the Rule in as much as the Rule has purportedly been framed to incorporate the ratio laid down

by this court in the case of Safimiya Malek which in terms had held that the seniority of the clerk-typist should be governed on the principle of continuous officiation and not from the date of passing of the examination. It is, therefore, submitted that the impugned proviso to the Rule(3) precisely resulted in the contrary situation and therefore has absolutely no nexus with the object of framing the said rule.

8. To make good his submission Dr.Sinha has invited Court's attention to the Notification issued by the General Administration Department, Sachivalaya, Gandhinagar, dated 30th March, 1994. Rule-3 of the said Rules says that a candidate who is appointed as a Clerk or a Clerk-typist subject to undergoing training and/or passing the examination shall get seniority from the date of joining service, if

he completes the post training and passes the examination as prescribed in Rule-7 within three chances (four chances in case of Scheduled Castes or Scheduled Tribe candidate), provided that seniority of a candidate as referred to above shall be counted from the date of passing the post training examination, if he fails to pass the examination as prescribed in Rule-7 within three chances (four chances in case of Scheduled Castes or Scheduled Tribes candidates). He submitted that this issue has come up before this Court in the case of Safimiya Malek vs. State of Gujarat and others and the notification dated 15.2.1985 was challenged. The contention was raised before the Division Bench of this Court that this amendment was not to operate retrospectively. It would mean that the persons who are already recruited cannot get the benefit thereof. They would continue to be governed by the respective

rules as they existed prior to the amendment. Apart from the fact that this situation would end up into a decotomy of bringing into existence two sets of employees, one recruited prior to the amendment and one thereafter. It would also create continuation of two sets of seniority. The event of fixation of seniority as and when it arises will be governed by the Rules that existed at the time when the event has occurred. After the amendment, if seniority is required to be fixed, Rules including the amendment should be allowed to have full play, then only, the real position could emerge. To allow the things to operate in the manner suggested by the respondent – State would not only continue the said decotomy but would bring about many anomolies in future. The Court further held that there was a reference to the amendment in the Direct Recruitment Procedure Rules as well as training

Rules clearly indicates falling back upon the Rules of continuous officiation and same is the position in Sub-service Examination Rules. In either event, therefore, there is no escape from the conclusion that the seniority is being fixed on the basis of the date of entering into the service and regulated thereafter on the basis of the continuous officiation.

9. Despite the fact that this Court has made it very clear in the case of Safimiya G. Malek (Supra) that the seniority is being fixed on the basis of date of entering into the service and regulated thereafter on the basis of the continuous officiation, the respondent authority while issuing notification dated 30.3.1994 inserted the proviso to Rule-3 of the Gujarat Non-Secretariat Clerks, Clerk-Typists and Typists (Training and Examination) (Amendment) Amending Rules, 1994 stating that

seniority of candidate as referred to above shall be counted from the date of passing the post training examination, if he fails to pass the examination as prescribed in Rule-7 within three chances (four chance in case of Scheduled Castes or Scheduled Tribes candidates). Dr.Sinha has, therefore, submitted that this proviso is contrary to the law laid down in Safimiya Case and it is also violative of Articles 14 and 16 of the Constitution of India.

10. In support of his submission Dr.Sinha has relied on the decision of the Hon'ble Supreme Court **in the case of Saroj Rani and another vs. State of Punjab and others, reported in 1999 AIR SCW 3358**, in para-19 of the said judgment the Hon'ble Supreme Court has paused as many as 7 questions, question (e) is that whether a person who has passed the test in first five

chances has preference over the persons passing the test in more than five chances ? While dealing with this question in para-23 of the judgment the Hon'ble Supreme Court has held that it is not in dispute, the promotion to the post of Assistant from amongst the eligible candidates is seniority-cum-merit. Eligible candidates in this context means all those who passed the examination in less than or more than five chances. They constitute as one group. There is no division among the qualifiers either under the rules or any order. This one cohesive group has to wait for promotion till vacancy arises. The promotion from among these eligible candidates, when principle of seniority-cum-merit is to be applied, there cannot be any preference inter se among the said two groups. Thus impugned order has rightly concluded, no preference can be given to those who has qualified in first

five chances over those who qualified in more than five chances.

11. Dr.Sinha has further submitted that passing of the examination is only for the purpose of acquiring eligibility to get promotion. However, once the examination is passed, the candidate is at par with all other candidates who have passed the examination within specified trial. In support of this submission, he relied on the **decision of Hon'ble Supreme Court in the case of M.H.Patil vs. State of Maharashtra and others, reported in (1999) 1 Supreme Court Cases 249**, wherein on the basis of Rule-3 of the Rules framed on 3.1.1962 for the departmental examination of persons appointed to the clerical and non-gazetted executive services of the Prohibition and Excise Department in the State of Maharashtra. The appellant has contended that

seniority for the purpose of promotion should be determined on the basis of the date of passing the examination. The High Court has negatived this contention relying upon the wording of Rule-3 which says that the seniority determined on the basis of the date of passing the departmental examination is for the purpose of confirmation only and not for any other purpose. The High Court has also pointed out the advantages which a candidate will derive by early confirmation if he passes the departmental examination earlier than his seniors. The High Court after considering the advantages which may flow from early confirmation under Rule-3, has held that Rule-3 will not affect the seniority on the basis of continuous officiation for the purposes of promotion provided the persons concerned have passed the departmental examination. The Hon'ble Supreme Court has further observed that

the said view has also been taken by the department right from the year 1977 onwards although prior to 1977, the department had interpreted the Rule as contended by the appellant. The seniority lists have been prepared on the basis of continuous officiation right from 1977 onwards. The Court, therefore, had not seen any reason now to disturb seniority list so prepared. The Hon'ble Supreme Court has, therefore, confirmed the order passed by the High Court and dismissed the appeal accordingly.

12. Dr.Sinha has further submitted that in light of the decision of the Hon'ble Supreme Court **in the case of Direct Recruit Class-II Engg. Officers' Association vs. State of Maharashtra (AIR 1990 SC 1607)**, now it is not open to the Government even to frame or follow the rule which says that the employee though

recruited in accordance with rules will not be given seniority from the initial date of appointment even though he passes the required departmental examination. It is, therefore, submitted that the operation of the rule relied upon by the authorities is against the law pronounced by the Hon'ble Supreme Court of India and is thus unconstitutional and therefore it cannot be allowed to stand in the eyes of law nor can it take away the right of the petitioner of earning his seniority from the initial date of his appointment.

13. Dr.Sinha has further relied on the decision of Division Bench of this Court **in the case of Shrikrishna K. Yadav vs. State of Gujarat & Ors., reported in 2002 XLIII (3) GLR 2426**, wherein it is held that if the seniority in the promotional post is to be based according to the date of passing of the examination, it is bound to affect adversely to the person who

could not appear in the examination for the aforesaid reason and despite the fact that they had put in substantially longer service than their juniors, they would lose their seniority only because of the fact that the juniors had declared the examination earlier in point of time. The Court further observed that apart from this, even if the issue is viewed from slightly different angle, it would show that date of passing examination can never be the only criterion for determining the seniority for promotional post. In a given case a senior most person in the cadre of Police Constables is unable to appear in qualifying examination held in a particular year due to compelling reason and cause beyond his control and many of his juniors clear the examination in that year. He is able to clear it only in the following year. Would this mean that all those juniors who cleared the qualifying examination in the

previous year would still march on him and his continuous officiation for years together would be wiped of for the purpose of fixing seniority in promotional cadre ? The answer can only be in negative as such promotion is not acceptable to service jurisprudence.

14. The relief prayed for in this petition was opposed by the State Government. An affidavit in reply is filed by one Mr.M.M.Mehta, Special Officer (Administration and Accounts), Office of the Government Pleader, High Court of Gujarat, Ahmedabad. Mr.L.B.Dabhi, learned AGP appearing for the respondent No.2 has submitted that the petitioner's appointment order makes it very clear that his appointment was made subject to the conditions that he would be required to pass Pre Service Training Examination as provided under the Rules called “The Gujarat

Non Secretariat Clerks, Clerk Typist and Typist (Direct Recruitment Procedure) Rules, 1970, failing which his services are liable to be terminated". He has further submitted that the petitioner has appeared in the Pre Service Training Examination three times. The petitioner however could not pass the said examination. Thereafter, the Deputy Director of Sardar Patel Rajya Vahivat Bhavan, Ahmedabad, had issued notification on 12.2.1990 that those who are selected under Central Recruitment Services and those who have not passed the Pre Training Examination within the prescribed chances and prescribed time, may be relieved from their service with immediate effect. Accordingly, the Government Pleader Office has issued an order dated 14.3.1990 to relieve the petitioner from his service after office hours. The said order was challenged by the petitioner before this Court in Special

Civil Application No.2271 of 1990 before this Court. The said petition was allowed and the petitioner was offered one more chance to appear in the examination as a fourth chance. The petitioner appeared in the examination as a fourth chance on 21.9.1990 and cleared the said examination. It is further submitted that in view of the Government Resolution dated 30.3.1994 and in view of the Government Notification dated 15.2.1985 the petitioner is not entitled to regain his position in the seniority list, more particularly in view of the facts that he has not cleared his Pre Training Service Examination within the prescribed chance.

15. Mr.Shukla learned advocate appearing for Mr.D.C.Dave, for respondent Nos.6 and 8 has submitted that the issue involved in the present petition is squarely covered by the

Division Bench judgment of this Court **in the case of N.C.Banawala vs. District Judge, Palanpur & Ors., reported in 2003(3) 44 GLR 1866**, wherein while summarizing the case law on the subject, Division Bench has observed that the law on the question of seniority and promotion with retrospective effect is well settled. For claiming the benefit of seniority, and that too, with retrospective effect, a person is required to hold substantive post of Junior Clerk and is further required to pass the LSD Examination by availing three chances and within three years as per the existing Rules. Having not cleared the examination with the specified chances and period, the petitioner was reverted to the post of Section Writer. Admittedly, the petitioner did not challenge the order of reversion any time, and has thus, virtually accepted the reversion and has remained on the post of

Section Writer till 1976 when he was promoted to the post of Clerk, on his clearing the LSD Examination. The petitioner is not justified in claiming promotion on the basis of his clearing the examination in 1975. The Court further observed that even the amended Rules require that unless a Clerk passes the LSD Examination, he cannot be confirmed and if he is not confirmed, the Clerk who had passed the said examination earlier will consequently be confirmed and will become senior to such Clerk who has not passed the examination. The Court, therefore, held that in view of the provisions of the statutory Rule, the petitioner who, admittedly, passed the LSD Examination much later, cannot claim seniority over the Clerks who passed the said examination earlier and got confirmed on the post. The Court, therefore, did not see any merit in the submission advanced on behalf of the petitioner and the

petition was accordingly dismissed.

16. Mr.Shukla has further relied on the decision of Hon'ble Supreme Court **in the case of Excise Commissioner, Karnataka and another vs. V. Sreekanta, reported in AIR 1993 Supreme Court 1564**, wherein the Hon'ble Supreme Court has held that the respondent was not entitled to claim seniority from the date of his initial appointment on ad hoc basis but he was only entitled to claim seniority from the date of his subsequent appointment or regularisation under the said special rules of recruitment in 1970. The Court further held that service rendered by the respondent prior to the regularisation was only on the basis of ad hoc employment and not made in accordance with the rules of recruitment.

17. Mr.Shukla has further relied on the

decision of the Division Bench of this Court in the case of A.N.Memon vs. Registrar, High Court of Gujarat & Ors., reported in 1999(2) 40 GLR 1516, wherein this Court has observed that failure to pass the examination as prescribed will render a Junior Clerk liable to have increments withheld until he passes the examination; on passing the examination, the increments withheld shall become payable to him from the date on which he passes the examination and all future increments shall accrue to him as if no increment had been withheld. However, the proviso makes its clear that he shall not be entitled to refund of actual pay which he lost owing to one or more increments having been withheld. If the examination would have been considered insignificant either there would have been no provision of withholding the increment or if there is a provision for withholding the

increment, the same would have been made payable. The Court was, therefore, of the opinion that the tenor of the Rule 42(6A) is such that a person working as a Junior Clerk is not considered to be of any merit even to receive the usual yearly increment if he does not pass the departmental examination. The provision to release the withheld increments is only with a view to ensure that he does not suffer monetarily after passing the examination. It is clear that the rule does not provide to consider such a person to be considered at par with a person who passed the test at the first trial. If that be so, passing of the test at the first trial definitely makes a person more meritorious than the person who passed the test after repeated trials. Reading the rule as it is, the Court was of the opinion that the rule making authority wanted to see that meritorious

persons, though equally situated, are earning their increments as they have cleared the examination.

18. Based on the aforesaid decisions, Mr.Shukla has strongly urged that the petitioner is not entitled to have his seniority on the basis of his initial appointment. The proviso to Rule-3 is, therefore, neither ultra vires nor contrary to the law laid down by this Court. The challenge to the said proviso is, therefore, unsustainable and the petition be dismissed accordingly.

19. After having heard the learned advocates for the respective parties and after having gone through the necessary pleadings as contained in the memo of petition as well as affidavit in reply and after having gone through the

relevant rules and the authorities cited before the Court, the Court is of the view that the controversy arose in the present petition is similar to one which arose in the case of Safimiya G. Malek & Ors. vs. State of Gujarat and Ors., reported in (1992) 33(1) GLR 704, wherein Gujarat Non Secretariat Clerks, Clerk-Typists, and Typists Recruitment Examination Rules, 1970 and Revenue Sub-service Departmental Examination Rules, 1971 were under consideration and the Court was called upon to decide as to whether the seniority should be fixed on the basis of continuous service and the Court has clearly held that the seniority is being fixed on the basis of date of entering into service and regulated thereafter on the basis of continuous officiation. The Court has directed the respondents to refix the seniority on the basis of continuous officiation within a period of 3 months and thereafter, work out the

consequences of these readjustments in accordance with the Rules.

20. Based on the said decision the State Government has issued notification dated 30.3.1994. In the preamble of the said notification, the State Government has made it clear that whereas the Gujarat High Court vide its judgment dated 24.3.1992 in Safimiya Malek vs. the State of Gujarat 33(1) GLR 704 and in judgment dated 7.6.1993 in the SCA No.1220 of 1983 inter alia held that the seniority of Clerks and Clerk-typists should be governed on the principle of continuous officiation and not on the basis of date of passing of post training examination and that the amendment made in 1985 in the Gujarat Non Secretariat Clerks, Clerk-typists (Training and Examination) Rules, 1970 must have retrospective effect so as to extend the

benefit of amendment to the class of employees who were recruited under the old rules before the amendment of the rules, and whereas the government, in the light of the aforesaid direction of the High Court, has decided to insert sub-rule (3) in rule-8 of the Gujarat Non Secretariat Clerks, Clerk-typists (Training and Examination) Rules, 1970 with retrospective effect from 10.6.1970 instead of prospective effect given from 15.2.1985, now, therefore, in exercise of the powers conferred by the proviso to Article 309 of the Constitution of India, the State Government has made the rules further to amend the earlier rules of 1985 and accordingly proviso was inserted. The said proviso is contrary to the law laid down by this Court in Safimiya case. The Court has in term held that the seniority being fixed on the basis of date of entering into the service and regulated thereafter on the basis of continuous

officiation. Despite this being the position, the proviso was inserted stating that seniority of a candidate shall be counted from the date of passing the post training examination. The insertion of this proviso is totally uncalled for and it was never contemplated while deciding the aforesaid case.

21. It is also equally important to note that the criterion for the promotion is seniority-cum-merit. The petitioner has joined service in the ear 1985. Simply because he has not cleared examination within 3 trials he cannot be denied the promotion or he cannot be put down below to his junior who have cleared examination within 3 trials. The judgments relied upon by Mr.Shukla are distinguishable on facts. In case of N.C.Banawala vs. District Judge, Palanpur & Ors. (Supra) the reversion order was not challenged and it has been

accepted till he passed the LSD examination and was promoted to the post of Clerk. Moreover, the petitioner in that case was officiating as Junior Clerk between the period from 1963 to 1969 purely on temporary basis, subject to clearing the LSD examination. Having not cleared the said examination within the period specified, the petitioner was reverted to the post of Section Writer which was not challenged by the petitioner. Looking to the peculiar facts of the case the Court has taken the view that the petitioner who, admittedly, passed the LSD Examination much later, cannot claim seniority over the Clerks who passed the said examination earlier and got confirmed on the post. Here in the present case, there was no question of reversion despite the fact that the petitioner was holding the post on temporary basis. The petitioner got one more chance pursuant to the order of this Court and cleared

the examination. As soon as he cleared the examination he was put on the same footing as others who have cleared the examination within 3 trials. Similarly, the case of Excise Commissioner, Karnataka and another vs. V. Sreekanta, (Supra) is also distinguishable, as in that case there was an ad hoc appointment and the regularisation of service was made subsequently. In that context the Court has taken the view that seniority is to be counted from the date of regularisation and not from the date of ad hoc appointment. Here in the present case, there is no question of ad hoc appointment. The petitioner's appointment was temporary and subject to passing pre-training examination within three trials. By virtue of Court's order, the petitioner got fourth trial and cleared the examination. Then there is no difference between the persons who cleared the examination either first, second or third trial

on the one hand and the petitioner who cleared it on the fourth trial. The proviso to Rule-3, making such difference is, therefore, clearly in violation of Articles-14 and 16 of the Constitution. The petitioner's seniority is, therefore, required to be counted from the date of his initial appointment. Likewise the decision of this Court in the case of A.N.Memon vs. Registrar, High Court of Gujarat & Ors. (Supra) is also distinguishable. In that case the question is with regard to withholding of the increment in case the candidate fails to clear examination within prescribed trial. Moreover, what was weighed with the Court in that decision was also one of the factors that the petitioner has approached Court very late after rejection of representation about promotion in 1974. The petitioner remained silent till 1982 when he made another representation regarding seniority after

rejection of the said representation he waited for one year before filing the petition. The Court therefore took the view that the petition was rightly dismissed on the ground of delay and latches. Here in the present case the issue is entirely different and there was no ground of delay or latches. The Court is, therefore, of the view that all the decisions which have been relied upon by the respondents are not applicable to the facts of the present case. The case of the petitioner is squarely governed by the 3 decisions relied on by Dr.Sinha, two of the decisions are of the Hon'ble Supreme Court and one decision is of the Division Bench of this Court. The Court is, therefore, in agreement with and even otherwise is duty bound to follow the said decisions. Accordingly, the respondents Nos.1 and 2 are hereby directed to assign the seniority to the petitioner in the cadre of Clerk-Cum-Typist

(English) from his initial date of appointment i.e with effect from 1.3.1985. The respondents Nos.1 and 2 are further directed to determine the seniority in the cadre of Clerks and Clerk-Cum-Typists, on the basis of the continuous officiation and to give further promotion to the petitioner from the cadre of Clerk-Cum-Typists, considering the seniority determined on the basis of the continuous officiation. The petition is , therefore, allowed. Rule made absolute to the above extent without any order as to costs.

(K. A. PUJ, J.)

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